Office-Supreme Court, U.S.
FILED
APR 20 1962
JOHN F. DAVIS, CLERK

No. 689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JOSEPH P. LEWIS and WILLIAM C. MURRAY, JR., as partners under the name and style of LEWIS and MURRAY, and BENTLEY M. McMULLIN,
Petitioners,

vs.

THOMAS J. FITZGERALD, Trustee in Bankruptcy,
Respondent.

IN THE MATTER OF
MIDYETT AND MAY CONSTRUCTION COMPANY,
a partnership consisting of HORACE LEON MIDYETT and RUEL FARRIES MAY, Bankrupt.

PETITION FOR REHEARING
of
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BENTLEY M. McMULLIN,
200 Dayton Street,
Denver 9, Colorado,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 689

JOSEPH P. LEWIS and WILLIAM C. MURRAY, JR., as partners under the name and style of LEWIS and MURRAY, and BENTLEY M. McMULLIN,

Petitioners,

vs.

THOMAS J. FITZGERALD, Trustee in Bankruptcy,

Respondent.

IN THE MATTER OF
MIDYETT AND MAY CONSTRUCTION COMPANY, a partnership consisting of HORACE LEON MIDYETT and RUEL FARRIES MAY, Bankrupt.

PETITION FOR REHEARING of PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that this court may grant a rehearing of their petition for a writ of certiorari, and as grounds therefor respectfully show unto the court as follows:

Since the passage of the Chandler Act (Act of June 22, 1938; 52 Stat. 840), Section 14 of the Bankruptcy Act, as amended, now appearing as 11 U. S. Code 32, has provided that

> "The adjudication of any person, except a corporation, shall operate as an application for a discharge: Provided, That the bankrupt may, before the

hearing on such application, waive by writing, filed with the court, his right to a discharge . . .

"After the filing fees required to be paid by this Act have been paid in full the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge . . . Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed . . ."

Section 7 of the Bankruptcy Act, as so amended, now appearing as 11 U. S. Code 25, provides that

"The bankrupt shall (1) attend at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge, and at such other times as the court shall order . . ."

These sections have been previously quoted or referred to in our petition for a writ of certiorari, and are referred to in this petition only for the purpose of making the quoted parts readily available for consideration in connection with what follows.

What we failed to point out in our petition for a writ of certiorari but which, because of its importance, should have been pointed out, is twofold.

In the first place the effect of these statutory amendments upon the right of bankrupt's counsel to compensation for services rendered in connection with objections to discharge has never been the subject of judicial interpretation. So far as this question is concerned, the two sections referred to are new legislation still awaiting judicial construction.

In the second place, and this is the point on which we particularly rely, the effect of the new legislation is to compel the bankrupt to perform certain statutory duties in connection with his discharge in every case in which the discharge is not automatically granted. In every case in which the discharge is not automatic the bankrupt is

now required to perform acts in the performance of which he is entitled to the services of an attorney.

If the bankrupt does not waive his right to a discharge, and if no objections to a discharge are filed, the discharge is granted automatically and the bankrupt is neither required nor permitted to do anything whatever in connection with the matter.

If the bankrupt desires to waive his right to a discharge, he can do so, but only by means of a writing filed with the court. In determining whether he should waive his right, and in preparing and filing the necessary writing, the bankrupt is entitled to the advice and assistance of counsel.

If the bankrupt does not waive his right to a discharge, and if objections to his discharge are filed, he is required by the statute to attend the hearing upon the objections, and in so doing is entitled to the advice and assistance of counsel.

Under today's legislation the bankrupt is compelled to accept a discharge unless he waives that right, in which case he is compelled to take specific affirmative action, or unless objections are filed, in which case he is compelled to attend the hearing. Under no circumstances can the bankrupt escape being subject to one of these three compulsions.

There can no longer ever be a case, in which the discharge is not automatically granted, in which the bankrupt is not required to perform some statutory duty. Always, under today's legislation, when the discharge is not automatic the bankrupt is entitled to the advice and assistance of counsel to aid him in the performance of these statutory duties.

And since, under the decisions of this Court and of the Circuit Court of Appeals for the Second Circuit which are cited in our petition for a writ of certiorari (pp. 9, 12), the attorney for the bankrupt is entitled to compensation for services rendered by him in aiding the bankrupt to

perform the duties imposed upon him by the act, there can no longer ever be a case in which the attorney for the bankrupt is not entitled to compensation in some amount for services properly rendered by him in connection with the bankrupt's discharge.

The amendment has created a new basis for the award of such compensation.

The situation thus presented is worthy of the attention of this court, for unless the decision of the United States Court of Appeals for the Tenth Circuit is corrected, virtually all individual bankrupts will hereafter be required to perform the duties imposed upon them by the provisions of the act relative to their discharges, without the advice or assistance of counsel. It is only under the most unusual circumstances that a bankrupt, who has within the preceding two months or so divested himself of all his property, can find the means to employ counsel at his own expense. If the decision of the Court of Appeals is not reversed, all, or nearly all individual bankrupts will hereafter be deprived of a substantial right bestowed upon them by the bankruptcy act itself.

Respectfully submitted,

BENTLEY M. McMULLIN,
200 Dayton St.,
Denver 9, Aurora, Colorado
Attorney for Petitioners

April 19, 1962.

CERTIFICATE OF COUNSEL

I do hereby certify that this petition for a rehearing of petitioners' petition for a writ of certiorari is filed in good faith and not for purposes of delay, and that the matters upon which this petition is based are substantial grounds available to petitioners and not previously presented.

BENTLEY M. McMULLIN